In the

Supreme Court of the United States

October Term, 1952

No. 180

Joseph Pignataro,

Petitioner,

against

Waterman Steamship Corporation,

Respondent,

and

Ryan Stevedoring Co., Inc.,

Respondent-Impleaded.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR WATERMAN STEAMSHIP CORPORATION IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Eastern District of New York is reported at 1951 A. M. C. 759 and not otherwise. The opinion of the United States Court of Appeals for the Second Circuit is reported at 194 F. (2d) 404.

Jurisdiction

The judgment of the Court of Appeals was entered on February 8, 1952. The petitioner has invoked jurisdiction of this Court under 28 U. S. C. 1254 (1).

Question Presented

Should this Court review the decree of the United States Court of Appeals for the Second Circuit, affirming the decree of an admiralty judge who, having seen all of the witnesses and heard conflicting testimony, found as a fact that a hatch cover did not break.

Statement

Proctors for the respondent are mindful of Rule 27 (4) of this Court but the petitioner, having incorrectly quoted the Court of Appeals' opinion, has similarly been so inaccurate in his "Statement" and "Analysis of the Testimony" and so much has been omitted, the respondent is constrained to present a full statement of the case.

On December 18, 1947, at about 7:30 P. M., the petitioner, a longshoreman employed by Ryan Stevedoring Co., Inc., while standing on a hatch board at the No. 1 hatch of the S. S. Albert K. Smiley, fell into the hold and was injured (fols. 291-292).*

The gravamen of the petitioner's case—that fundamental fact he tried to prove at the trial—was that the hatch board broke. After a trial where conflicting evidence was presented, the admiralty judge found as matter of fact that "the hatch board upon which the libelant was standing at the time of the accident did not break" (fol. 314).

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* Folio references relate to "Appendix to Appellant's Brief" in the Court below, unless otherwise noted.

After seeing and hearing all of the witnesses (there were no depositions) the admiralty judge concluded the libelant had "failed to establish by a fair preponderance of the credible evidence any negligence on the part of the respondent" or "any unseaworthiness of the S. S. ALBERT K. SMILEY" (fol. 315). As he wrote in his opinion (fols. 291-305) his conclusions were based in part on the "demeanor" of the petitioner's witnesses, the "evasiveness" of several of them, frequent "contradictions" of each other and previous written statements, unusual agreement on "minute details" and by believing testimony presented by the respondent.

The Court of Appeals for the Second Circuit, being fully informed in the premises by the record, briefs and oral arguments, applied the firmly established rule of law that an appellate court will not disturb a trial court's findings of fact unless they are "clearly erroneous". The Court said:

> "• • • There was conflicting testimony and the trial judge refused to believe the libellant's witnesses indicating in his opinion that their demeanor while testifying gave rise to serious doubts as to their credibility. He concluded that the libellant had not sustained his burden of proving that the cover was defective, which fact was the *sine qua non* of the respondent's liability on the theory that the ship was unseaworthy which libellant advanced at the trial. It is almost superfluous to state that on this record the trial court's findings are not clearly erroneous, and the decree, therefore, is affirmed."

Turning to the facts as developed at the trial, all who testified on the subject were in agreement that on the night before the accident, and at the time of the accident, all of the hatch covers appeared to be in good condition (Petitioner's witnesses Zelinski and Sigmund Kosek, Re-

spondent's witness Radigan, fols. 149, 157, Appendix to Appellee's Brief, pp. 18a, 36a). Consequently the petitioner abandoned any claim based on negligence in presenting the matter to the Court of Appeals and urged the theory that there was some unseaworthiness involved. Indeed, that was the theory upon which the case was tried.

The opening at No. 1 hatch where petitioner was injured was about 25 feet in length, about 24½ feet in width, and five steel beams divided it into six sections. Each of the sections was covered by nine hatch boards, running fore and aft. Each hatch board was about 4 feet long, 2½ feet wide, 2 inches thick, and was reinforced by a steel or iron band about 2 inches wide and ¼th inch thick, attached to the board with screws and running along the entire perimeter of both top and bottom of the board (fol. 294).

Immediately before the accident, the hatch boards had all been replaced in the three forward sections except one board had been left out of the center of the second section, and through this space ran a fall or cable, with bridle and hooks attached, so that the hatch beams could be replaced in the 'tween deck. After the hatch beams had been replaced in the 'tween deck, there was no further need for the bridle and hooks there, so the hatch foreman stood on one of the hatch covers on the main deck and was guiding the cable so that the bridle and hooks would come through the opening without being caught under the beam or hatch covers. The petitioner offered to do this job and, while standing on a hatch board, he fell into the hold (fols. 294-296).

The petitioner contended the hatch board broke. The respondent contended the libelant lost his balance, either in reaching for the fall, or because the shackle caught underneath the hatch board and lifted it up (fols. 292-293).

At the time of the accident there were twelve men working in petitioner's gang. Four men were on the main deck

and eight were on the 'tween deck (fol. 293). The petitioner called as witnesses five men who said they were in the 'tween deck and one who had been on the main deck (fol. 296). The respondent called as witnesses the other two men who had been on the main deck (the petitioner did not testify), the night relief mate, and the security officer (fols. 297-299).

There was a direct conflict in the testimony of the petitioner's witnesses who had been in the 'tween deck. Zalinski and Stanley Kosek said they saw the hatch cover come down in two pieces (fols. 139, 160). Lecki, who had an equal opportunity to see, only saw the petitioner but did not see the hatch cover falling down and, therefore, could not testify it was broken (fols. 172-173). Zaluski testified twice he saw "the hatch cover coming down" (fols. 181-182) and then said he saw it in two pieces as it fell, and described the pieces in great detail (fols. 182-183). The final witness from the 'tween deck, namely, Carmine Pignataro, a cousin of the libelant, testified affirmatively that he saw *the hatch cover fall in one piece* (fols. 189-193).

The petitioner's witness who had been on the main deck was Sigmund Kosek, the hatch foreman. He testified that after having handed the fall to the petitioner, he did not see Pignataro but "heard a cracking of wood and a scream and as I turned around he was going through that hatch cover" (fol. 196). He did not remember a written statement he had made less than a month before trial (fols. 200-201), wherein he had said he did not know what caused Pignataro to fall (fol. 202). Even the printed record shows his evasiveness (fols. 201, 203, and Appendix to appellee's brief, pp. 17a-18a).

The two witnesses who had been on the main deck and who were called by the respondent, namely, Privi and Del Gatto, repudiated previous written statements and showed by their demeanor they were anxious to help the

libelant (fol. 302). The former testified in *cross examination* that the hatch cover broke (fol. 219), although this was in direct conflict with his previous written statement (fols. 234, 298-300). The latter also repudiated his written statement, in which he had said that while Pignataro was guiding the fall as the bridle and hooks were being raised from the 'tween deck, the shackle bolt caught on the underside of the edge of the hatch cover on which he was standing, thus causing the hatch cover to raise about an inch, slide toward the starboard side of the ship, and Pignataro lost his balance (fols. 254-256).

Radigan, the night relief mate, had entered in the log that Pignataro had lost his balance while the gang was placing crossbeams in the forward part of the 'tween deck (fol. 208). He said he had received this information from Del Gatto (fol. 209). Del Gatto denied this on cross examination (fols. 269-270). The admiralty judge resolved the issue of credibility in favor of the respondent (fol. 302).

After the accident, the longshoremen covered up the hatch on the main deck by inserting the hatch covers. To account for the board allegedly broken and in the hold, Sigmund Kosek, the hatch foreman, testified for the petitioner that the space normally filled by the "missing" hatchboard was taken up by leaving spaces between the other eight hatchboards (fol. 204). Radigan, the night relief mate, and Petrosino, the security officer, both flatly contradicted this assertion and said all of the hatch covers were in place and in good order (Appendix to appellee's brief, pp. 24a, 25a, 47a, 48a). Additionally, Petrosino's testimony showed that Sigmund Kosek did not see the accident. Kosek had previously given to Petrosino two versions of the accident, saying of the second that it was a better version "of what I got from the men" (fols. 278-281).

The petitioner's advocate having objected, the witness Reid did not give any substantive testimony (Transcript of Record, pp. 280-284). There was produced before the admiralty judge a hatch cover similar to the one involved in the case at bar. It was inspected by the Court under a stipulation that it would not have to be made a part of the record and that it might be returned to the vessel from which it had been brought (Appendix to appellee's brief, p. 58a).

Summary of Argument

The petition for certiorari in this case is entirely based upon a misquotation of the opinion of the Court of Appeals for the Second Circuit. The petitioner has incorrectly printed the opinion of the court, omitting a vital matter which results in a distortion of the actual holding. When the true opinion of the court below is considered, it will be seen that the petition automatically falls.

The whole issue which was litigated in the District Court was whether a hatch board broke. The evidence on the subject was in direct conflict, as the record amply discloses. The trial court decided the contested issue of fact adversely to the claim of the petitioner. He wrote a deliberate opinion and based his conclusions as to which witnesses he chose to believe upon their demeanor, evasiveness, conflicts in vital matters, unusual agreement in minute details and the other customary criteria used by all triers of the fact.

Disbelieving the petitioner's witnesses, and having found as a fact that the hatch board did not break, the District Court was under no obligation, and indeed it was impossible, to make any affirmative finding supporting either of the theories advanced by the respondent. To have done so would have been to commit error, and the petitioner can hardly be heard to complain that the trial court failed to commit error.

The petitioner has cited no authority to support a petition for certiorari in a case of this character. The law is quite clear in the Court of Appeals that as an appellate court it will not and indeed cannot disturb the findings of fact of a trial court except in those rare instances where there has been obvious error. It considered the record in the case at bar, and could find no error, manifest or otherwise. The rule in this Court that in the absence of plain error the findings of fact below are conclusive here has been too frequently expressed to result in any misunderstanding on the part of the members of the bar. The case has been unanimously decided below on conflicting evidence. It is well established that this Court will not grant certiorari to review such evidence.

The petitioner has presented no authority for his position here, but has referred to a large number of cases on miscellaneous problems of evidence, etc., no one of which has any effect whatever upon the pending application. There is no problem of law presented by the petition, and no valid reason has been assigned, directly or indirectly, why the conflicting evidence heretofore thoroughly reviewed on two occasions should now be reviewed for the third time.

POINT I

The entire petition is based upon misquoting the opinion of the Court of Appeals for the Second Circuit in a vital matter.

The "Opinion Below" (Petition and Brief, p. 2) is not an accurate copy of the opinion of the Court of Appeals and such inaccuracy is at the core of the petition and brief in support thereof. Woven into the petition and brief is the assertion, iterated in various forms, that the Court of Appeals did not review the record of the evidence but decided the case on "alleged evidence, which

it assumed from argument of counsel had been presented at the trial, but which in fact was non-existent" (Petition and Brief, pp. 1, 2, 5, 6, 8, 24). It is demonstrable that (a) the Court of Appeals understood the record; (b) the record amply supports the real opinion of the Court of Appeals; and (c) the petitioner has created and demolished a non-existent opinion of the Court of Appeals.

It is said in the petition (p. 6) that the Court of Appeals based its affirmance on a finding that *two* witnesses (Radigan and Petrosino) had testified that the hatchboard covers were in good condition *before* the accident. In an attempt to support that unfounded allegation, the opinion has not only been misquoted at page 3, but more viciously at page 7 where it has been written:

> "The Court continued:
>
> "* * * but did produce witnesses in the persons of Radigan and Petrosino, who testified in substance that the hatchboard covers were in good condition *before* the accident occurred.'" (Emphasis supplied.)

The Court did not say that. It actually wrote:

> "* * * but did produce witnesses in the persons of Radigan and Petrosino, who testified in substance that the hatchboard covers were in good condition *after* the accident and Radigan testified that they were in good condition *before* the accident occurred." (Emphasis supplied.)

Concerning the condition of the hatch covers *before* the accident there never was any dispute. Bearing in mind that the accident happened after 7 P. M., the following testimony of Radigan is found at page 36a, Appendix to Appellee's Brief, the first question relating to 5:10 P. M.:

> "Q. Now, the hatch covers that you saw at that time, either in place or lying alongside of the square

of the hatch, were they in good condition, so far as you could see? A. They were in good condition.

Q. I am talking about No. 1 hatch. A. Yes.

Q. In good condition? A. In good condition.

Q. And you could see nothing wrong with them? A. No.

Q. When was the next time that you got back to No. 1 hatch on December 18, 1947? A. About another hour I was around there looking.

Q. About 6:10? A. When they knocked off.

Q. And that is the time they go out to supper? A. Yes.

Q. And at that time was the condition of the main deck with respect to the crossbeams and the hatch covers still the same as it was at 5:10 P. M.? A. Yes.

Q. Was the 'tween deck with respect to the crossbeams and the hatch covers still the same? A. Yes.

Q. Now, when was the next time you returned to No. 1 hatch on the night of December 18, 1947? A. They came back from supper.

Q. No. When was the next time you returned to No. 1 hatch? A. 7 o'clock.

Q. And again was the condition of the No. 1 hatch the same? A. Yes."

At folio 149, the petitioner's witness, Zalinski, testified about the condition of the hatch covers on the night *before* the accident:

"Q. Now, when you covered this hatch by putting on the hatch covers that weren't already on you didn't find anything wrong with the hatch covers at that time, did you? A. No, sir."

And, again, at folio 157, the same witness testified:

"Q. You have testified that when you finished covering the No. 1 hatch on the night before the accident

there was nothing wrongg with the hatch boards or anything else. Now the next morning when you took them off was there anytthing wrong? A. To me it looked all right."

The petitioner's witness, Stanley Kosek, testified affirmatively that the hatch covvers were "all right" *before* the accident. The following aappears at page 18a, Appendix to Appellee's Brief:

"Q. As I understood yoour testimony, in answer to Mr. Gay, you yourself wwere standing on the hatch covers guiding this runneer before you turned it over to Pignataro? A. Yes, sir.

Q. Did you look arounad at the hatch covers? A. Yes, sir.

Q. Did they look all rigght to you? A. They seemed all right.

Q. If they had seemed bad to you would you yourself have walked on thosee hatch covers? A. No, sir.

Q. Would you have told any of your men to walk on those hatch covers? A. No, sir."

Thus, it is seen that Radiggan did testify to the condition of the hatch covers *before* the accident, as the Court of Appeals said he did. Addiitionally, his testimony was supported by two of the petiitioner's witnesses as indicated. There never was any dispute by any witness over the condition of the hatch covvers *before* the accident and, indeed, the petitioner does not even allege that any dispute on that subject ever exisited.

The witness Petrosino, the security officer, did not see the hatch covers *before* the accident. The Court of Appeals was perfectly clear on Petrosino's testimony and distinguished the testimony off Radigan and Petrosino by writing that they *both* testified the hatch covers "were in good condition *after* the accident and Radigan testified

that they were in good condition *before* the accident occurred."

As a prelude to presenting the testimony of Radigan and Petrosino concerning the condition of the hatch covers *after* the accident, its effect in demolishing what remained of the petitioner's case should be indicated. The whole case revolved around the allegedly broken hatch board. If it had broken and fallen into the hold, the longshoremen would have had to do *something* when it came time to cover up the hatch *after* the accident. They might have procured another hatch cover elsewhere, or they might have spaced the remaining eight hatch covers a few inches apart to take up gradually the total space previously occupied by the allegedly broken hatch cover. The petitioner chose the latter explanation and presented it through the witness, Sigmund Kosek (fol. 240).

As to the situation *after* the accident, Radigan testified as follows, at pages 24a, 25a, Appendix to Appellee's Brief:

"Q. Now you said that after the accident you looked down into the hold where Mr. Pignataro was; is that correct? A. Yes, sir.

Q. Did you see any hatch covers down in that hold? A. No.

Q. Now, was the hatch that night before you went off duty, was that No. 1 hatch covered? A. Yes.

Q. Who covered the hatch? A. The stevedores.

Q. Were you there when they covered it? A. Yes.

Q. What were the conditions of the hatch boards? A. The hatch boards were all placed on the hatch in good condition.

Mr. Schwartz: I object to that.

The Court: Overruled.

Mr. Schwartz: He doesn't know. He didn't see it.

The Court: He says he was there at the time the crew was putting the hatch boards on.

Mr. Schwartz: I didn't hear him say that.

The Court: Yes, he did.

Q. You were there at the time they were putting the hatch boards on and covering up the hold; is that right? A. Yes, sir.

Q. Was there anything wrong with any hatch board? A. No.

Q. Did any stevedore make any complaint to you that any hatch boards were defective? A. No, sir.

Q. Was the hatch fully covered? A. Yes, sir.

Q. Were there any beams vacant or missing? A. No.

The Court: Were there any spaces between boards?

The Witness: No."

Petrosino testified at pages 48a, 49a, Appendix to Appellee's Brief, concerning the condition of the hatch *after* the accident, as follows:

"Q. When you went back to the No. 1 hatch you do not know whether there were spaces in between some of the hatch boards—you did not look that closely? A. As I said, from my recollection every board seemed to be good.

Q. Are you willing to testify under oath that there were no two or three-inch spaces between some of those boards? A. Definitely, yes, sir.

Q. You are willing to testify to that? A. Yes, sir."

* * * * * *

"Q. But you remember this particular hatch, the No. 1 hatch on the Smiley, that all the hatch boards were exactly in proper position and no space in between the hatch boards; isn't that so? A. Yes, sir.

Q. You definitely remember that? A. Yes, sir.

Q. How far did you go in school? A. I graduated from grammar school and graduated from high school. I went to the Police Academy and Police College.

Q. And your memory is good enough to remember two years ago that the hatch boards were exactly in place with no space between any of the hatch boards? A. The reason I remember this—

Q. Is that correct, or isn't it correct? A. Yes, sir."

Someone lied. The trial judge found that Kosek did, and, once he believed the testimony of Radigan and Petrosino, the inference to be drawn was perfectly obvious, namely, the hatch board never went into the hold and, indeed, never was broken.

Petrosino did not testify he saw the hatch boards *before* the accident. The Court of Appeals did not say he did. The petitioner *claims* the Court of Appeals wrote to the contrary and has purported to quote from the opinion (pp. 6, 7). The material quoted does not exist, as inspection of the Court's actual opinion will disclose.

POINT I

The decision of the trial court was made on conflicting evidence.

The petitioner insists upon repeating here that his evidence was uncontradicted (Brief pp. 6, 15, 22, 23); he proved the hatch board broke (Brief, p. 15); no material fact was in conflict (Brief, p. 17); his witnesses were unimpeached and their testimony was credible (Brief, pp. 17, 19, 20, 21). This was unsuccessfully ventured in both the District Court and in the Court of Appeals. Apparently the theory is that if one states a proposition dogmatically and often enough it ripens into a "fact".

At the risk of repetition, it should be said again that there was one real and substantial issue of fact which was

tried before the admiralty judge. That issue of fact was whether the hatch board broke. The petitioner's case had inherent in it a very grave contradiction. Two of the witnesses (Zalinski and Stanley Kosek) said they saw the hatch cover fall in two pieces. Another witness testified twice he saw "the hatch cover coming down" and then said he saw it falling in two pieces. The fourth of these witnesses, namely, Carmine Pignataro, testified affirmatively that the hatch cover fell down in one piece.

The petitioner glibly endeavors to explain away the testimony of Carmine Pignataro (Brief, p. 9) by saying, "he doesn't remember two pieces of a hatch board falling with his cousin, as it was too dark for him and he was excited". That this is a distortion of the actual testimony of the witness may be demonstrated beyond all doubt by a mere reading of his direct examination at folios 188-193. The witness testified definitely, affirmatively and unequivocally, as the judge's comment shows, "he said it was a hatch cover". Part of the distortion arises from the question put to the witness whether he had looked (into the hold) after the accident and the witness said it was too dark. No amount of explanation or glossing over or twisting can change the objective fact that one of the petitioner's witnesses, similarly situated on the vessel as all of the others in the 'tween deck, did testify, as opposed to the others, that the hatch cover fell down in one piece. If the admiralty judge was justified in believing Carmine Pignataro, then further consideration of the petition should be needless.

But the deficiencies in the petitioner's case did not end with this direct conflict between petitioner's witnesses on this most important subject. The description of the alleged two pieces furnished by the witnesses Zalinski, Stanley Kosek and Zaluski was too much for the admiralty judge to stand. In that fraction of time it took the alleged two pieces to fall past them from the main deck, they were able

to be in complete and minute agreement (fols. 140, 141; 165-169; 183).

The difficulties with the petitioner's case did not end even there, for there appeared the hatch foreman, Sigmund Kosek, who testified for the petitioner. He forgot that he had signed a written statement less than a month before the trial (fols. 200-201), wherein he had said he did not know what caused Pignataro to fall (fol. 202). He proceeded without restraint to join the longshoremen's parade to prove the hatch board broke, all facts to the contrary notwithstanding. Even the record shows his evasiveness (fols. 201-203, and Appendix to appellee's brief, pp. 17a and 18a). Reference is made particularly to his answers, "it could be and it couldn't be". The situation at the trial was so bad that the admiralty judge took over the interrogation of this witness. The interrogation by the Court was conveniently omitted in the Appendix to the petitioner-appellant's brief, but the entire cross examination may be found in the Appendix to appellee's brief, pages 13a to 18a, inclusive, and the interrogation by the Court may be found at pages 17a and 18a.

In view of the total picture depicted by the petitioner's witnesses en masse, the respondent could have rested on the petitioner's case without changing the result. Actually, the respondent's trial advocate sought to demonstrate further, if such demonstration was really needed, that the petitioner's case was made of whole cloth. There were two ways in which trial counsel could meet what remained of an issue of fact. He could call eyewitnesses to the event or could prove other facts from which a reasonable inference might be drawn that the hatch cover did not break. He did both. Armed with written statements of the other two longshoremen who were on the deck at the time of the accident, he called them to the stand. The first witness, Privi, joined the petitioner's camp at the earliest opportunity, namely, under so-called cross examination by petitioner's proctor (fol. 219). He then dis-

avowed the written statement and went along with the others (fols. 222-238). Del Gatto repudiated his written statement shortly after the direct examination began (fols. 243-265). In both instances, the witnesses insisted upon remaining with their repudiation, and thus the respondent could not prove affirmatively by eyewitnesses what had really happened.

What life, if any, was left in the petitioner's case was extinguished by the witnesses Radigan and Petrosino. Their testimony furnished the *coup de grace,* as explained in Point I hereof.

The Court of Appeals recognized that the admiralty judge had made findings of fact on a direct conflict of testimony, and his conclusion destroyed the petitioner's case. It affirmed, saying, "it is almost superfluous to state that on this record the trial court's findings are not clearly erroneous". It thus applied the rule, firmly established and uniformly accepted in the Court of Appeals, that to relieve an appellate court from the impossible burden of assaying credibility, the weight of the evidence and kindred problems, a trial court's findings of fact will not be disturbed save in the rare instance of manifest error.

Petterson Lighterage & Towing Corp. v. *New York Central R. Co.,* 126 F. (2d) 992;
United States v. *Forness,* 125 F. (2d) 928, 942;
Kulukundis Shipping Co. v. *Amtorg Trading Corp.,* 126 F. (2d) 978, 980;
Johnson v. *Andrus,* 119 F. (2d) 287;
James Richardson & Sons v. *Connors Marine Co.,* 141 F. (2d) 226, 230;
Grillo v. *United States,* 177 F. (2d) 904;
Crane v. *Evans Transportation Corp.,* 155 F. (2d) 940, 941;
Fodera v. *Booth American Shipping Corp.,* 159 F. (2d) 795, 797;
Kilgust v. *United States of America,* 191 F. (2d) 69.

The rule demarcating the scope of appellate review has been applied exactly the same to cases where the admiralty judge has dismissed a libel because he has not been satisfied with the libelant's proof as to those cases where he made affirmative findings that certain conditions did exist.

> *Stuart* v. *Alcoa S. S. Co.*, 143 F. (2d) 178, 179;
> *Roberts* v. *United States*, 186 F. (2d) 1005, 1006;
> *Seaboard Sand & Gravel Corp.* v. *American Stevedores, Inc.*, 151 F. (2d) 846.

The substance of the foregoing doctrine is in complete harmony with the uniform principles enunciated by this Court. Concurrent findings of fact by the District Court and the Court of Appeals are adopted here as a conclusive basis for decision in the absence of plain error or no evidence at all to support the findings.

> *Virginian Ry. Co.* v. *System Federation, No. 40*, 300 U. S. 515, 542;
> *Williams Mfg. Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367;
> *Texas & N. O. R. Co.* v. *Brotherhood Ry. & S. S. Clerks*, 281 U. S. 548, 558;
> *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 477.

This Court has said in *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U. S. 271, 275:

> "* * * A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error (citing cases)."

The general rules established by the foregoing cases have been further particularized and rendered even more

apposite to the case at bar in *Just* v. *Chambers,* 312 U. S. 383, 385, where this Court held that it will not review the evidence as to the cause of a personal injury where it is urged the evidence is insufficient to support the findings of fact. In similar vein this Court has held in *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96, 98, that this principle involving appellate review is applied in admiralty cases, as well as in those where the suit has been at law.

Since the decision of the trial court was made on conflicting evidence, it is the well established rule that this Court will not grant certiorari to review that evidence especially where the Court of Appeals has concurred in the fundamental finding of fact.

POINT III

No affirmative finding of fact as to the cause of the accident was either necessary or possible under the facts.

Petitioner's assertion to the contrary (Brief, p. 22), he had the burden of proving that the hatchboard broke, whether he cast his claim in the language of negligence or unseaworthiness. *Grillo* v. *United States, supra.* In this he failed, and that was enough to conclude the dispute.

At the trial the respondent contended, although it was under no legal obligation to contend or prove anything, that the petitioner fell either because he lost his balance while reaching for the fall or because the cargo hook at the end of the fall caught under the hatchboard (fols. 292, 293).

The vessel's log which was offered in evidence by the petitioner (fol. 207) showed that the petitioner "lost balance and fell down into hold" (fol. 208). Thus, the log supported *both* of respondent's contentions, but did not point *exclusively* to either. Additionally, the log entry was

based upon hearsay, so it would have been questionable to make a needless affirmative finding of fact upon it, even though it was offered by the petitioner.

Privi had signed a statement that the petitioner was guiding the fall out of the hatch at the time of the accident (fol. 233) and Del Gatto had signed a statement that the petitioner "had his hands on the fall and was guiding it up when the shackle bolt caught on the under edge of the hatch cover on which he was standing. I saw the hatch cover raised about one inch and then slide toward the starboard side of the ship and causing Pignataro to lose his balance and fall into the hold" (fols. 254-256). The witnesses repudiated their statements.

The petitioner argues here that it is improper to call a witness for the purpose of impeaching him by inconsistent statements; such statements are not original evidence, and may be used only for impeachment (Brief, p. 15). He cites *Kuhn* v. *United States,* 24 F. (2d) 910, rehearing denied and reversed in part, 26 F. (2d) 463, cert. den., 278 U. S. 605; *New York Life Ins. Co.* v. *Bacalis,* 94 F. (2d) 200; *Fong Lum Kwai* v. *United States,* 49 F. (2d) 19; and *D'Allessandro* v. *Bechtol,* 104 F. (2d) 845. The respondent has no quarrel with the basic principles enunciated in those cases.

Privi's statement was used after he departed from the truth during cross examination and petitioner's advocate withdrew all objections to it at the time of trial (fols. 236, 237). Del Gatto's statement was used, with the permission of the trial Judge, as soon as Del Gatto embarked upon an obvious course of disavowing the statement and helping the libellant. The legal effect of these statements was well understood by the trial Judge, namely, they destroyed the credibility of the witnesses, *but did not affirmatively prove any fact recited in those statements.* The admiralty Judge made no affirmative findings of fact based upon them. If he had, he would have committed error.

The petitioner's complaint here is that the trial Judge did not commit the error; that "the trial Court made no finding of fact as to the cause or manner of the happening of the accident" (Errors Complained of, No. 1, Brief, p. 5). The speculation that if the trial Judge had affirmatively found either of the theories proposed by the respondent, it "might very well have been the basis for a decree in favor of petitioner under the law" (Brief, p. 5) is just fantastic. Either theory would obviously lead to automatic exoneration of the respondent.

POINT IV

The trial court's decision was not based upon any "mood" or "personal displeasure".

From the admiralty Judge's opinion (fols. 289-304) and his findings (fols. 307-316) it is patent his resolving of the conflicts was based upon a conscientious and deliberate weighing of the testimony, using those criteria traditionally employed by all triers of fact in finding the truth after seeing and hearing witnesses. It is utter blather to characterize the trial function as one of "mood" or "personal displeasure", because one dislikes the result emanating from the judicial process.

The trier of the facts has a function which is onerous, serious and even sacred to the extent its honest execution has a solemn oath as its sanction. The ascertainment of facts is not a mechanical science. It is an art involving judgment and to assist the trier in forming that judgment the law cautions that one should consider in the courtroom what one considers in dealings outside the courtroom, namely, the "demeanor" of witnesses. The trier of the facts looks as well for "interest", candor, conflicts of testimony, unusual agreement of witnesses in minutiae, indications of a contrived case, contradictions

between oral testimony at trial and previous declarations of the witness, and for similar guides which will lead him to ascertain the truth.

For all of the signs the admiralty Judge did look. He found "evasiveness" in several of the petitioner's witnesses and frequent conflicts between them in vital matters. His conclusions were based in part on "demeanor". He found contradictions between testimony at trial and previous written statements. He found the petitioner's witnesses in unusual agreement in minute detail, one of the best indices of the fabricated case. He credited the respondent's witnesses and did not believe those who testified for the petitioner. He did not make the error of determining the weight of the credible evidence by counting heads.

To attribute to the admiralty Judge's disbelief, conscientiously resting in his appraisal of the witnesses and their testimony, such words as "mood" and "personal displeasure" can hardly detract from the demonstrable fact that he actually performed his job well. A unanimous Court of Appeals has affirmed him. There the litigation should end.

POINT V

The cases cited by the petitioner are inapposite and there is no problem of law in the case.

The petitioner has cited not a single case to support his position that certiorari should be granted here. Indeed, research discloses no case where certiorari has been granted merely to review conflicting evidence on a common subject in private litigation where the record shows thorough consideration of the facts by both the trial court and the Court of Appeals. These Courts have concurred. The evidence has been twice appraised and unanimously found to defeat the petitioner's claim. As Mr.

Justice Holmes said in *United States* v. *Johnston*, 268 U. S. 220, 227:

> "We do not grant a certiorari to review evidence and discuss specific facts."

See also, the cases cited in Point II hereinabove.

The cases to which the petitioner has referred, and his miscellaneous arguments deal with such varied subjects as "remote posibilities", "inferences", "rules of evidence concerning physical facts", "credibility", "positive and negative evidence", etc. Such problems are all foreign to this petition for certiorari. But, as briefly as possible, the cases cited by petitioner and his promiscuous arguments will be discusssed for the sake of completeness.

Betzag v. *Gulf Oil Corp.*, 298 N. Y. 358, is presented for the proposition that the petitioner was not required to negative remote possibilities (Brief, p. 15). In this case the petitioner was not asked to deal with anything remote. His burden was simply to prove the hatch board broke and he did not prove it.

It is urged the Court below failed to consider the "Count for unseaworthiness" (Brief, p. 15). There was no "count" for unseaworthiness but the case was tried on that theory. The trial court dealt with the subject (fol. 315) as did the Court of Appeals (Opinion, fol. 61).

Cannella v. *Lykes Brothers S. S. Co.*, 174 F. (2d) 794 (Brief, p. 15) recognizes the well-known distinctions between negligence and unseaworthiness. The trial court disposed of both theories here (fol. 315).

At Brief, page 16, the petitioner has presented the case of *Erie R. Co.* v. *Murphy*, 9 Fed. (2d) 525; *Sutton's Adm'r* v. *Louisville & N. R. Co.*, 168 Ky. 81, 181 S. W. 938; and *Gulotta* v. *U. S.*, 113 Fed. (2d) 683. The first two of the named cases deal with the legal definition of

inferences and the distinction between inferences and presumptions. The respondent agrees entirely with the relevant portions of the two opinions. Indeed, the quotation from the *Sutton* case, explains in part why the petitioner failed in his proof at the time of trial. The third case dealt with a criminal trial and nothing whatever in it has even a remote bearing upon the case at bar.

Apparently, based upon the rules relating to inferences, the petitioner is presenting some argument about the trial court drawing an inference on an inference (Brief, p. 24). This is not so. The court drew no inference that the witnesses were interested in the petitioner's cause and from that inference drew the further inference that they were not telling the truth and from that inference that the hatch board did not break. The court simply applied the usual norms to the witnesses and the testimony before him as explained in Point IV hereinabove, and resolved the dispute against the petitioner. In this connection the petitioner has commented upon the fact that the ship's officers and master were not called as witnesses by the respondent (Brief, pp. 12, 24). The respondent was under no obligation to call anyone in view of the nature of the case presented by the petitioner, but as the witness Radigan explained, he had relieved the ship's officers who left the vessel at 5:00 P. M. two and one-half hours before the accident (Appendix to Appellee's Brief, p. 19a).

Petitioner's attack on the credibility of the witness, Petrosino, at Brief, page 17, is as irrelevant here as it is unfounded. He was the security officer at the pier. The quotation in petitioner's brief relates to Petrosino's testifying when a member of the New York Police Department. He had never testified before in a case involving a ship (Appendix to Appellee's Brief, p. 48a).

Barbarino v. *Stanhope S. S. Co.*, 151 F. (2d) 553 (Brief, p. 18) is presented in distorted fashion by beginning the

quotation in the middle of a sentence. It actually holds that where an admiralty judgesets up a standard of care, a norm against which a respondent's conduct is to be measured, the Court of Appals is not bound by that standard which obviously savors of a conclusion of law and is not really a finding of fact.

At pages 19-20 of the Brief,petitioner cites cases dealing with "uncontradicted" tetimony. Under the actual facts here that is quite fatuou.

Travelers' Indemnity Co. v.*Parkersburg Iron & Steel Co.*, 70 Fed. (2d) 63; *Mutual Life Ins. Co. of New York* v. *Sargent*, 51 Fed. (2d) 4; *Alaama Title & Trust Co.* v. *Millsap*, 71 Fed. (2d) 518; and *Gibson* v. *Southern Pac. Co.*, 67 Fed. (2d) 758, all dealt wit the problem of whether a trial judge should have submited the case to the jury or should have granted a motionfor a directed verdict. In all of the cases, except the *Alabama Title* case, the appellate courts held the issues wee for the jury. In the exceptional case, the court gave onclusive legal effect to the recitals in a previous court oder for eviction. In *Ariasi* v. *Orient Ins. Co.*, 50 Fed. (2d)548, the court held that the recitals in an order issued by he Prohibition Department were not evidence of the truthof such recitals.

To support some rule aboutthe weight of positive and negative evidence the petitioer has cited *The Buenos Aires*, 5 F. (2d) 425, *The Windrush*, 286 F. 251, *Lancashire Shipping Co.* v. *MorseDry Dock & Repair Co.*, 43 F. (2d) 750, and *The Fort St. George*, 22 F. (2d) 195 (Brief, p. 21). Generally, the cases are examples of the triers of the facts weighing idence given by those who saw or heard against evidenceby those who said they did not see or hear or evidence b fact witnesses against expert testimony. In no sense dothey disturb the traditional function of the trier of the fts to weigh the evidence. Indeed, in three of the cited ases that is what the trial

courts were doing. Beyond this, there was no "negative" evidence in the respondent's case. The witnesses testified affirmatively to what they personally saw.

The burden of proof of unseaworthiness was squarely on the shoulders of the petitioner. See *Grillo* v. *United States, supra.* The petitioner relies upon the case of *American Co. for International Commerce* v. *United States,* 26 Fed. (2d) 468, for the proposition that a ship owner has the burden of proving due diligence to make a ship seaworthy (Brief, p. 22). This is a well-recognized rule of law in cases of cargo damage, which the cited case was. This is equally true both under the Harter Act, 46 U. S. C. 191, which was involved in that case, and the Carriage of Goods By Sea Act, 46 U. S. C. 1300. Certainly the rule has nothing whatever to do with a personal injury action. Due diligence to make a vessel seaworthy is a matter of *defense* in a cargo case. Unseaworthiness is part of the libelant's affirmative proof where he has pleaded it as a ground for recovery in a personal injury action.

Nelson v. *Robin Line Steamship Co., Inc.,* 39 F. (2d) 430 (Brief, p. 22), dealt with negligence and iterated the rule that if the libelant shows a defective appliance and injury from it, he has sustained his burden of proof even though other inferences might possibly be drawn to exonerate the vessel. Obviously, there is a condition precedent, namely, proof of fault. In establishing fault (a broken hatch cover), this petitioner completely failed.

Of *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, no more can be said than it extended the doctrine of seaworthiness to longshoremen but there is no word in the opinions to indicate that longshoremen no longer are required to prove anything or that all they are required to do is to utter the magic word "unseaworthiness" and receive an automatic recovery even though the trier of the facts cannot believe the testimony presented.

The Irving S. Olds v. *The John M. McKerchey*, 72 F. Supp. 256; *The City of New York*, 147 U. S. 72, and *Belden* v. *Chase*, 150 U. S. 674 (Brief, p. 23) were all collision cases in which were applied the usual rules that once fault has been proved against a vessel, she has certain obligations as to proof if she is to be exonerated. Obviously, fault must be shown before the consequence follows. *United States Fidelity & Guaranty Co.* v. *United States*, 152 F. (2d) 46, cited at Brief, page 23, for the same proposition is so utterly foreign to the rule it is alleged to enunciate that no discussion whatever is warranted.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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